IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.1042 OF 2007
IN
SUIT NO.3853 OF 2002

Tarla N. Morjaria & Ors ..Plaintiffs
V/s
Bipin Hiralal Shah & Another ..Defendants

None for the plaintiffs.

Mr. Cyrus Ardeshir a/w Mr. Nilesh Modi and Ms Deepali Thakar i/b Rustamji & Ginwala for the defendants.

CORAM : A.A. SAYED,J.
DATE : 26TH OCTOBER, 2007

P.C.

1. This notice of motion has been taken out by the defendants praying that the order dated 31st January, 2007 passed in Notice of Motion No. 299 of 2007 be set aside/recalled/modified to the extent of prayer clause (b) thereof, directing that the suit be placed for Ex-parte Decree against the defendants for want of written statement under order VIII Rule 10 of Civil Procedure Code and to take the written statement of the defendants on record and for condonation of delay of 1248 days in filing the written statement.

2. The suit is filed inter alia for a declaration that use, occupation and possession of the suit premises i.e. portion marked in red ink in the plan of Flat No. 13 situate at 34, Krishna Building, 2nd floor, 6 Khetwadi, S.V.P. Road, Mumbai-400 004, by the defendants is illegal and unauthorised and the defendants are trespassers thereof and for an order and decree against the defendants to hand over vacant and peaceful possession of the suit premises and for mesne profits.

3. Since the written statement was not filed the plaintiff took out Notice of Motion No. 299 of 2007 inter alia praying for placing the above suit for exparte decree and to expedite the hearing of the suit, wherein, the order dated 31-01-2007 came to be passed.

4. It is the case of the defendants in the Affidavit in support of the notice of motion that due to the oversight and inadvertence, the written statement remained to be filed. It is their case that in view of the order passed by this Court to

decide the preliminary issue of jurisdiction, the defendants were under impression that if, the Court holds that this Court has no jurisdiction to try the suit and dismiss the suit on that ground, there would be no need to file written statement.

5. I have heard the learned Counsel for the defendants. None, however, appeared on behalf of the plaintiffs when the notice of motion was called out and therefore, I did not have the advantage of hearing the plaintiffs.

6. The learned Counsel for the defendants submitted that the plaintiffs moved the notice of motion No. 299 of 2006, which was filed on 23-01-2007, for ad interim reliefs on 31-01-2007, though the returnable date was on 28-02-2007. It is submitted that on the very first date itself i.e. on 31-01-2007, without granting any time and giving any opportunity to the defendants to give explanation and allowing the defendants to file an affidavit-in-reply, the Court was pleased to make the said notice of motion absolute in terms of prayer

clause (a) and (b). It was therefore contended that the circumstances under which the written statement was not filed could not be explained. The learned Counsel further submitted that the matter was shown on board for 'directions' on that day but the notice of motion was heard finally.

7. The learned Counsel submitted that that the defendants were pursuing and contesting the matter diligently throughout, and an opportunity, therefore, ought to be given to them to defend the suit by filing their written statement, else the defendants would be on the streets and irreparable harm and injury would be caused to them. He further submitted that by permitting the defendants to file their written statement the plaintiffs would not be prejudiced as the suit has not been listed for hearing so far.

8. The learned Counsel for the defendants placed reliance in the case of **Vithal Ramchandra Patil Vs. Bhagwat Waman Gaikwad and others**, reported in 1996 (2) Mah. L.J. 1064 and submitted that this Court

could invoke inherent powers to meet the ends of justice, if it is found that there is apparent injustice likely to be caused to any of the parties, as held in the said case.

9. I find merit in the submission of the learned Counsel for the defendants. It is noted that in the above suit Court Receiver has been appointed in respect of the suit premises by an order dated 5th June, 2006, after the Court had appointed Commissioner to record the evidence on two preliminary issues i.e. regarding the jurisdiction of this Court and ownership of the plaintiffs of the suit premises. By this order dated 5th June, 2006, the defendants are appointed as agents of the Court Receiver and the defendants are now paying royalty in a sum of Rs. 4,900/- per month in respect of the suit premises. Moreover, there were several other interlocutory proceedings in the suit which were contested by the parties. On perusal the records, I find that the defendants have pursued the matter and have been diligent thorough out the pendency of the suit. It cannot therefore be said that because of

this one lapse on the part of the defendants of not filing written statement in time, the defendants could be termed as negligent or that their default was wilful and in order to cause delay in hearing of the suit. Furthermore, I find that no opportunity was given to the defendants to file a reply in the notice of motion No. 299/2007 to explain the circumstances under which they could not file their written statement. It is further noted that the order dated 31-01-2007 came to be passed when the matter was kept for 'direction' and the order dated 31-01-2007 was passed without recording the consent of parties to take up the notice of motion for final hearing.

10. In the case of **Shaikh Salim Haji Abdul Khayumsab Vs. Kumar and others**, reported in (2006) 1 SCC 46 it is held by the Apex Court as under:-

> "All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual of law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system no party should ordinarily be denied the opportunity of participating in the

process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any of the procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The mortality of justice at the hands of law troubles a Judge’s conscience and points an angry interrogation at the law reformer.

Order 8 Rule 1 after the amendment casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the Court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Further, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Substituted order 8 Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases, causing inconvenience to the plaintiffs and the petitioners approaching the court for quick relief and also the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried.

Though the power of the Court under the proviso appended to Rule 1 of Order 8 is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided for though they may be read by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts,

> when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form."

11. Applying the principles laid down in the above case by the Apex Court, and in the peculiar facts and circumstances of this case, I am satisfied that the present case would fall within the rare cases where the extended time prescribed under Order 8 Rule 1 requires to be extended further and the order dated 31-01-2207 is required to be set aside to the extent of placing the suit for exparte decree. In my view, the defendants have made out sufficient cause for condonation of delay in filing of written statement and the interest of justice will be served in permitting the defendants to file their written statement by imposing costs. Hence, notice of motion is made absolute in terms of prayer clause (a) and (b) subject to costs of Rs. 5000/- to be paid by the defendants to the plaintiffs. Payment of costs is condition precedent. Written statement be filed within two weeks. It is clarified that the order dated 31-01-2007, in so far as it expedites the suit is not questioned in the present notice of motion and

would remain in force.

12. Notice of motion is disposed of accordingly.

(A.A. SAYED, J.)